



## ICCL/ICHR submission to Oireachtas Justice Committee consultation on direct provision in Ireland

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Irish Council for  
**Civil Liberties**

**IRISH CENTRE  
FOR HUMAN RIGHTS**

31<sup>st</sup> May 2019

By email to [directprovision@oireachtas.ie](mailto:directprovision@oireachtas.ie)

**RE: COMMITTEE ON JUSTICE AND EQUALITY CONSULTATION ON DIRECT PROVISION**

To the members of the Oireachtas Committee on Justice and Equality:

We are pleased to enclose a submission for the purpose of your consultation and report on conditions in the Direct Provision system and the question of whether there are better or alternative models that should be pursued.

We hope that our observations will be of assistance and we encourage you to contact us should you require any further information.

Kind regards

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Irish Council for  
**Civil Liberties**

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FOR HUMAN RIGHTS**

## 1. About us

This is a joint submission by the Irish Council for Civil Liberties (ICCL) and Dr Maeve O'Rourke of the Irish Centre for Human Rights, NUI Galway.

Founded in 1976, ICCL has worked over 40 years to defend and strengthen constitutional rights protections and to ensure the full implementation of international human rights standards in Ireland. ICCL draws on the tradition of civil liberties activism in many countries, including the civil rights movements in Northern Ireland, the United Kingdom and the United States. It has developed strong partnerships with a broad range of civil society organisations in Ireland and networks and alliances with similar organisations internationally. ICCL was a founder member of the International Network of Civil Liberties Organisations (INCLO) and a founder and coordinator of the JUSTICIA European Rights Network of 19 civil society organisations working in the area of procedural rights, defence rights, and victims' rights. Domestically focused and internationally informed, ICCL has played a leading role in some of Ireland's most important human rights campaigns.

In November 2018, ICCL made a [Submission](#) to the United Nations Committee Against Torture (CAT)<sup>1</sup> in response to the CAT's three most urgent recommendations to Ireland from July 2017, one of which was that Ireland must immediately ratify the Optional Protocol to the Convention Against Torture (OPCAT) and establish a National Preventive Mechanism (NPM) to conduct independent monitoring of all places of detention in the State. ICCL argued in that submission – and has recommended to the Department of Justice – that Direct Provision must be recognised as a place where *de facto* detention can and does occur, and that the State must therefore ensure a system of robust independent monitoring of Direct Provision for as long as the system persists with a view to preventing torture or ill-treatment from occurring in those settings.

Dr Maeve O'Rourke has researched and advocated extensively for the past 10 years in relation to the arbitrary detention, labour exploitation, forced family separation and other grave human rights abuses of women and children in the system of Magdalene Laundries, Mother and Baby Homes and related institutions during the 20<sup>th</sup> century in Ireland. Prior to joining the Irish Centre for Human Rights at NUI Galway she worked for the ICCL as Senior Research and Policy Officer from October 2017 to January 2019.

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<sup>1</sup> Irish Council for Civil Liberties, 'NGO Submission to the United Nations Committee against Torture: Follow-up to the 2017 Concluding Observations of the Committee against Torture' (23 November 2018), <https://www.iccl.ie/wp-content/uploads/2018/11/ICCL-Follow-up-report-to-UNCAT-final-23.11.18.pdf>

## **2. Introduction and overview of submission**

We agree with the organisations and independent experts that have called for an end to Direct Provision. Ireland's history of grave and systematic abuse in institutions should make it obvious that the State cannot discharge its constitutional, European or international human rights responsibilities towards individuals who need the State's assistance by (1) outsourcing social service provision to private, largely unaccountable, commercial entities and (2) containing people in institutions operated by those entities.

We also agree with the recommendations already received by the Committee (e.g. from the Irish Refugee Council (IRC) and the Movement of Asylum Seekers in Ireland (MASI)) that the Department of Justice is not the appropriate Department with which to place responsibility for meeting the accommodation, health and other social service needs of people seeking international protection. The direct testimonies of people living in Direct Provision – particularly their experiences of being isolated from society, being forced into a relationship of almost total dependency on the managers of the institutions in which they live, and being denied access to many basic opportunities and services in Irish society – convey a clear sense that people in Direct Provision feel, and are effectively, living in punitive detention. We believe that the fact of placing responsibility for Direct Provision in the Department of Justice contributes to this penal culture and practice.

We are reminded of the treatment of a group of survivors of the Magdalene Laundries who applied to the *ex gratia* scheme which the Department of Justice has administered since 2013, and whose experiences were the subject of the Ombudsman's Report in late 2017, *Opportunity Lost*. The Ombudsman's report demonstrated that there was a culture of disbelieving survivors within the Department of Justice, and of going overboard to 'protect against fraudulent claims'.<sup>2</sup> The Department that had been responsible for detaining girls and women in Magdalene Laundries, both as part of the ordinary criminal justice system and on an *ad hoc* basis through the involvement of An Garda Síochána, was not of an appropriate mindset to administer 'restorative justice' measures to women who had suffered grave human rights violations in Magdalene Laundries.

The remainder of this submission focuses on the following areas:

- Section 3: A summary of some of the key human rights issues facing people living in Direct Provision Centres.
- Section 4: The approach that should be adopted by the Committee when it visits Direct Provision settings.
- Section 5: The State's absolute legal obligation to refrain from and prevent torture or ill-treatment.

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<sup>2</sup> Office of the Ombudsman, *Opportunity Lost: An investigation by the Ombudsman into the administration of the Magdalen Restorative Justice Scheme* (2017), pp 9, 40.

- Section 6: The need for robust independent inspections of Direct Provision Centres and, to this end, the urgent need for Ireland to ratify the Optional Protocol to the Convention against Torture and create a National Preventive Mechanism.
- Section 7: Why Direct Provision Centres should be considered places of deprivation of liberty.
- Section 8: Other accountability measures that are required.

### **3. Human rights violations: modern-day institutional abuse**

The constitutional and human rights violations that frequently arise in Direct Provision have been clearly described by the Movement of Asylum Seekers in Ireland (MASI) among others. These include:

- Dignity violations (such as the race- and ethnicity- based discrimination that the overall Direct Provision system constitutes);
- Denial of the constitutional right to work<sup>3</sup> (for many, if not most, international protection applicants due to barriers such as the type of permits provided, lack of access to driving licenses and frequently to a bank account, and major exclusions from the right as provided for by Government);
- Denials of the right to education (notably for children who are in ‘emergency’ settings, as noted by the Irish Refugee Council (IRC) during the Committee hearing on 29<sup>th</sup> May 2019);
- Cruel, inhuman or degrading treatment (for example, as a result of long-term institutionalisation or an accumulation of conditions in Direct Provision, or by way of abusive incidents by staff or by individuals from whom people living in Direct Provision are inadequately protected);
- Denial of the right to health (due to enforced conditions of living that impair mental health; and lack of access to adequate healthcare for both physical and mental illness);
- Violations of the right to respect for private and family life (including overcrowding; denial of recreational areas for children and adults; stringent limitations on access to food and cooking facilities; unnecessary and unauthorised requirements to produce identity documents; discriminatory or humiliating treatment in legal or employment processes related to certain markers as a person living in Direct Provision or otherwise as an international protection applicant);
- Denials of the right to effective access to the international protection system (for example, due to excessive delays in the application process; lack of access to appropriate and necessary legal assistance, including inadequate legal aid provision; denial of effective access to interpretation and translation; and a lack of monitoring or transparency of certain interviews);

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<sup>3</sup> See *NVH v Minister for Justice & Equality and ors* [2017] IESC 35 paras 13, 15, 17.

- Denials of the right to access justice and a remedy for rights violations experienced while living in Direct Provision (for example, due to a lack of access to legal aid for European human rights-based or constitutional rights-based claims);
- Arbitrary detention, where individuals are in practice not free to leave Direct Provision settings despite there being no legal basis for their deprivation of liberty.

Appearing before the Oireachtas Justice Committee on 29<sup>th</sup> May 2019, CEO of the Irish Refugee Council, Nick Henderson, argued that Direct Provision is ‘already a chapter in Ireland’s long and dark history of institutional living’. We agree that the Direct Provision system bears many similarities to the abusive systems of institutionalisation that operated in Ireland throughout the 20<sup>th</sup> century and in respect of which the Irish people have begun to demand apologies and concrete measures of atonement.

Looking to the past can help us to recognise the reality of how we are treating people today. In the case of Direct Provision, as with Ireland’s Magdalene Laundries, the State enforces destitution and isolation on people whom it then characterises as those ‘with nowhere else to go’ to whom the State has in fact shown great benevolence and charity. There is a real danger when groups are designated ‘vulnerable’, that instead of intensifying our commitment to protect and ensure their equal treatment as should be the case, the label is used to justify or cloak the denial of basic rights. It is absolutely essential that the core of the State’s provision for people seeking international protection in Ireland is recognition and robust legal enforcement of the State’s constitutional and human rights obligations towards them.

#### **4. Oireachtas Committee’s upcoming visits to Direct Provision settings**

The Oireachtas Committee has stated that it will be visiting several Direct Provision settings in due course. We urge the Committee to adopt international human rights best practice in conducting these visits. Specifically, we recommend that the Committee follow the requirements of the Optional Protocol to the Convention against Torture (OPCAT) which establishes standards for the independent monitoring of places of deprivation of liberty in order to protect against torture and cruel, inhuman and degrading treatment. As we explain below, Ireland has signed but not yet ratified the OPCAT (and is now an outlier in Europe in that regard). We also explain below why we believe that Direct Provision settings are places where people may be *de facto* detained and therefore why we view these settings as falling within the purview of the OPCAT.

The Committee has a unique and crucial opportunity to demonstrate how Direct Provision settings could and should be monitored in accordance with the OPCAT’s requirements. The Committee should, in our view, carry out unannounced visits, be accompanied by interpreters, conduct private interviews, and ensure that it both ascertains the whereabouts of all Direct Provision settings including ‘short-term’ or ‘emergency’ locations and includes some of those ‘short term’ or ‘emergency’ settings in its visits. We understand that there are up to 600 hundred people, including 88 children, currently in emergency accommodation.

The UN Subcommittee on Prevention of Torture (SPT) has published an [Assessment Tool](#) which, along with the text of the OPCAT, establishes the following minimum powers that an inspection body must have:<sup>4</sup>

- The power to select the timing of visits and determine whether they are to be announced or unannounced;
- The power to choose the persons to be interviewed;
- The power to have private interviews without witnesses, either personally or with a translator if deemed necessary;
- Access to all information referring to the treatment of those persons as well as their conditions of detention;
- Access to all information, including personal and sensitive information, premises and persons necessary for pursuing its mandate; and
- Access to all information concerning the number of persons deprived of their liberty as well as the number of places and their location.

We urge the Committee to ensure that that they have this level of access when visiting Direct Provision settings.

## **5. The State's obligation to prevent torture or ill treatment**

The Irish State has an absolute obligation to prevent torture and other cruel, inhuman or degrading treatment or punishment occurring within its jurisdiction.<sup>5</sup> It is universally accepted that deprivation of liberty gives rise to a heightened risk of torture or ill-treatment occurring and that states have more intense obligations of supervision in these contexts. Article 10 of the International Covenant on Civil and Political Rights (ICCPR)<sup>6</sup> and its equivalents in universal and regional human rights law place a positive obligation on states to ensure that those who are deprived of their liberty are treated humanely and with respect for their dignity.

The UN Committee against Torture's General Comment No 2 states that:

each State party should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.<sup>7</sup>

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<sup>4</sup> United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'Analytical assessment tool for national preventive mechanisms' (25 January 2016) UN Doc CAT/OP/1/Rev.1, [https://www.ohchr.org/Documents/HRBodies/OPCAT/CAT-OP-1-Rev-1\\_en.pdf](https://www.ohchr.org/Documents/HRBodies/OPCAT/CAT-OP-1-Rev-1_en.pdf) para

<sup>5</sup> *Article 1 OPCAT*: The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

<sup>6</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 10.

<sup>7</sup> CAT General Comment No 2, 'Implementation of article 2 by States Parties' (23 November 2007) UN Doc CAT/C/GC/2 para 15.

The Government is aware that the Direct Provision system subjects individuals to intense suffering on account of their experience of institutionalisation, continuous supervision and control and social isolation. The treatment of these individuals puts the Irish State at risk of violating its international obligations and should underline the urgent necessity of reforming the Direct Provision System.

In August 2017 the UN Committee against Torture (the CAT) issued [Concluding Observations](#) on Ireland's current record under the Convention Against Torture.<sup>8</sup> The Committee against Torture recommended that the Government:

**Establish a formalized vulnerability screening mechanism for torture victims and other persons with special needs, provide them with care and protection to avoid re-traumatization, including during international protection procedures.<sup>9</sup>**

The Government is clearly failing to provide care and protection to those seeking international protection who may have been subject to torture.

## **6. The need to urgently ratify OPCAT and establish a National Preventive Mechanism**

In 2017, the CAT designated three of the recommendations in its Concluding Observations as 'follow-up' issues, requiring a response from the Irish Government within one year. The first of these 'follow-up' issues concerns the ratification of the UN Optional Protocol to the Convention Against Torture, (OPCAT) as follows:

### **8. The State party should:**

**(a) Immediately ratify the Optional Protocol and establish a national preventive mechanism, ensuring that this body has access to all places of deprivation of liberty in all settings;**

**(b) Ensure that existing bodies which currently monitor places of detention as well as civil society organizations are allowed to make repeated and unannounced visits to all places of deprivation of liberty, publish reports and have the State party act on their recommendations.**

The purpose of OPCAT is to assist states in implementing their absolute obligation to prevent torture and other cruel, inhuman or degrading treatment or punishment occurring within their jurisdictions.<sup>10</sup> It is universally accepted that deprivation of liberty gives rise to a

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<sup>8</sup> United Nations Committee against Torture, Concluding observations on the second periodic report of Ireland, UN Doc CAT/C/IRL/CO/2 (31 August 2017), [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fIRL%2fCO%2f2&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fIRL%2fCO%2f2&Lang=en)

An explanation of the CAT 'follow-up' procedure is here: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/210/35/PDF/G1521035.pdf?OpenElement>

<sup>9</sup> United Nations Committee against Torture, Concluding observations on the second periodic report of Ireland, UN Doc CAT/C/IRL/CO/2 (31 August 2017), para 12(b) [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fIRL%2fCO%2f2&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fIRL%2fCO%2f2&Lang=en)

<sup>10</sup> *Article 1 OPCAT*: The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture



heightened risk of torture or ill-treatment occurring and that states have more intense obligations of supervision in these contexts. Article 10 of the International Covenant on Civil and Political Rights (ICCPR)<sup>11</sup> and its equivalents in universal and regional human rights law place a positive obligation on states to ensure that those who are deprived of their liberty are treated humanely and with respect for their dignity.

Despite signing the OPCAT in 2007, Ireland is now one of only four EU countries that [have not ratified](#) the instrument.<sup>12</sup> This leaves people who are either legally or *de facto* deprived of their liberty in Ireland in a particularly powerless position because they do not have the protection of the independent, human rights-focused inspection and monitoring system which the OPCAT requires states to establish.

We urge the Committee to recommend that Ireland ratifies the OPCAT immediately and that it sets about establishing a National Preventive Mechanism (NPM) in accordance with the OPCAT's requirements. For as long as the Direct Provision system exists, we believe that it should come within the remit of the future Irish NPM.

The Minister for Justice [has indicated](#) that the Government wishes to put in place legislation establishing a National Preventive Mechanism (NPM) *before* Ireland ratifies the OPCAT.<sup>13</sup> However, as the ICCL has [previously highlighted](#),<sup>14</sup> it is not necessary for Ireland to have an NPM in place before ratifying the OPCAT. Articles 11 and 24 [OPCAT](#) provide states with the option of ratifying the instrument first, and then establishing an NPM with the assistance and advice of the UN Subcommittee on the Prevention of Torture.

The Minister for Justice [stated last year that](#) he intended to publish before the end of 2018 a General Scheme of a Bill to establish a system of independent inspection of all places of deprivation of liberty in the State.<sup>15</sup> To date, the ICCL has not seen the draft content of the legislation or any written policy from the Department of Justice regarding its intentions for the NPM.

We recommend that the legislation establishing an NPM should designate all relevant inspection and monitoring bodies (including the Ombudsman and Ombudsman for Children, which currently monitor Direct Provision) collectively as the NPM and establish the Irish

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and other cruel, inhuman or degrading treatment or punishment.

<sup>11</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 10

<sup>12</sup> See United Nations Office of the High Commissioner, Status of Ratification Interactive Dashboard, <http://indicators.ohchr.org/>

<sup>13</sup> Houses of the Oireachtas, Written Answers, 5 July 2018, <https://www.iccl.ie/wp-content/uploads/2018/05/ICCL-submission-on-deprivation-of-liberty-safeguards-web-version.pdf>

<sup>14</sup> Irish Council for Civil Liberties, 'Submission to the UN Committee Against Torture for the State Examination of Ireland's Second Periodic Report' (26 June 2017), [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2FCAT%2FCSS%2FIRL%2F27963&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2FCAT%2FCSS%2FIRL%2F27963&Lang=en)

<sup>15</sup> See Dail debates, Priority Questions, 5 July 2018, <https://www.kildarestreet.com/debate/?id=2018-07-05a.16>

Human Rights and Equality Commission (IHREC) as the coordinating body. The IHREC has ‘A status’ as Ireland’s National Human Rights Institution. It is also Ireland’s independent monitoring mechanism for the UNCRPD and is currently publicly recruiting a Disability Advisory Committee.

## **7. Why Direct Provision Centres should be recognised as places of deprivation of liberty**

The definition of deprivation of liberty under human rights instruments is broad and does not in principle exclude any particular form of detention or restraint. Deprivation of liberty need not be caused by physical force. A person’s inability to leave a place or escape a situation may also arise due to non-physical forms of coercion, including the exercise of power over a person who is dependent on another for care and/or to meet their basic needs.

### *Physical confinement*

A common definition of deprivation of liberty under international human rights law is lack of freedom to leave a place at will. Article 4(2) OPCAT defines deprivation of liberty as ‘any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority’.<sup>16</sup> According to the Inter-American Commission on Human Rights, ‘the concept of “deprivation of liberty” encompasses: [a]ny form of detention, imprisonment, institutionalization, or custody of a person in a public or private institution which that person is not permitted to leave at will’.<sup>17</sup> The ECtHR finds the objective aspect of a deprivation of liberty to exist where a person is ‘under continuous supervision and control and not free to leave’.<sup>18</sup> The HRC, meanwhile, has held that a person will not be deprived of their liberty if they ‘know that they are free to leave at any time’.<sup>19</sup>

### *Coercion*

Lack of physical freedom to leave a place at will, and physical restraint, are not the only established conceptions of deprivation of liberty in international human rights law, however. The ECtHR has held that an ‘element of coercion’ is indicative of a deprivation of liberty.<sup>20</sup>

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<sup>16</sup> Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) (2003) 42 ILM 26 (OPCAT) art 4(2).

<sup>17</sup> IACmHR, Inter-American Commission on Human Rights (IACmHR), Principles and Best Practices on the Protection of Persons Deprived of their Liberty in the Americas (13 March 2008) IACmHR Res 1/08, OEA/Ser/L/V/II.131 doc 26 para 38.

<sup>18</sup> See *HL v United Kingdom* (2005) 40 EHRR 32 para 91; *DD v Lithuania*, App no 13469/06 (ECtHR, 14 February 2012) para 146.

<sup>19</sup> United Nations Human Rights Committee, General Comment No 35, ‘Article 9 (Liberty and security of person)’ (16 December 2014) UN Doc CCPR/C/GC/35, para 6.

<sup>20</sup> See, for example, *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 1105. Although the Court did not ultimately make a finding in relation to Article 5 in this case, it stated at para 57 that being stopped and searched for 30 minutes was ‘indicative of a deprivation of liberty’. In *Novotka v Slovakia*, App no 47244/99 (ECtHR, 4 November 2004), the ECtHR found a deprivation of liberty where a person was ‘brought to a police station against his will and was held there in a cell’ for less than an hour (p7). See also *DD v Lithuania* App no

The Court rejects the notion that deprivation of liberty must take any particular form.<sup>21</sup> It holds that what matters is the ‘degree or intensity’ of the restriction on movement<sup>22</sup> and the ‘concrete situation’ of the person concerned having regard to the ‘type, duration, effects and manner of implementation of the measure in question’, among other factors.<sup>23</sup> Harris, O’Boyle and Warbrick note that the ECtHR has held resulting social isolation to be a key factor in determining the existence of a deprivation of liberty.<sup>24</sup>

The ECtHR has found deprivations of liberty to exist in the mental health care context even where premises are unlocked<sup>25</sup> and where a person has previously gone on outings or visits away from the institution.<sup>26</sup> Individuals have been found to be ‘not free to leave’ where permission to leave the premises is required,<sup>27</sup> where a person’s guardian is required to consent to the person leaving,<sup>28</sup> where there are restrictions as to the length of time and destination to which a person may go,<sup>29</sup> where an institution restricts access to a person’s identity documents or finances, which would enable them to travel,<sup>30</sup> where a person is returned—for example, by the police—when they leave,<sup>31</sup> or where it is clear that a person would be prevented from leaving if they tried or returned to the institution if they did.<sup>32</sup>

#### *Detention, institutionalisation and coercion in Direct Provision settings*

We believe that there is a strong argument to be made that Direct Provision accommodation amounts, in some if not all instances, to *de facto* deprivation of liberty. Our understanding of this is informed by discussion with Doras Luimni, solicitors with experience of working with people living in Direct Provision and MASI, among others. Due to the nature of the Direct Provision and international protection system in Ireland:

(a) People seeking international protection are in practice **not free to leave** Direct Provision because:

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13469/06 (ECtHR, 14 February 2012) para 149; *Krupko and Others v Russia*, App no 26587/07 (ECtHR, 26 June 2014) para 36; *Foka v Turkey*, App no 28940/95 (ECtHR, 24 June 2008) para 78.

<sup>21</sup> See *Guzzardi v Italy* (1981) 3 EHRR 333 para 93.

<sup>22</sup> See *Guzzardi v Italy*, *ibid*; *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 para 314; *Stanev v Bulgaria* (2012) 55 EHRR 22 para 115.

<sup>23</sup> See *Guzzardi v Italy*, *ibid* para 92; *Medvedyev and Others v France*, App no 3394/03 (ECtHR, 29 March 2010) para 73; *Creangă v Romania* (2013) 56 EHRR 11 para 91.

<sup>24</sup> See Harris and others, *Law of the European Convention on Human Rights*, *ibid* 290–91, citing *Guzzardi v Italy* (n 73); *HM v Switzerland* (n 52) para 45; *Storck v Germany* (2006) 43 EHRR 6 para 73.

<sup>25</sup> *HL v United Kingdom* (2005) 40 EHRR 32 para 92, citing *Ashingdane v the United Kingdom* (1985) 7 EHRR 528 para 41.

<sup>26</sup> *Stanev v Bulgaria* (2012) 55 EHRR 22.

<sup>27</sup> *ibid* paras 124–126.

<sup>28</sup> *Kedzior v Poland*, App no 45026/07 (ECtHR, 16 October 2012) para 57. The Court referred also to *Stanev v Bulgaria* (2012) 55 EHRR 22 para 128.

<sup>29</sup> *Stanev v Bulgaria* (2012) 55 EHRR 22 para 124.

<sup>30</sup> *ibid* para 125–26.

<sup>31</sup> *ibid* para 127; *DD v Lithuania* App no 13469/06 (ECtHR, 14 February 2012) para 146.

<sup>32</sup> *HL v United Kingdom* (2005) 40 EHRR 32.

- It is the only source of state provision for a person's basic needs (food, shelter, medical assistance) while they await determination of their international protection application.
- It is generally not possible to choose which Direct Provision Centre one lives in, or even one's roommates, and transfers are extremely difficult to obtain.
- People living in Direct Provision are not provided with a travel pass, and it is not generally possible for people living in Direct Provision to obtain an Irish driver's licence. Outside of strictly and sparsely provided bus transport to and from, for example, the closest town, people living in Direct Provision generally do not have access to the means to leave the accommodation centres except for on foot.
- If a person stays away from the Direct Provision centre for a certain number of nights, they are at risk of losing their place in the system.

(b) People living in Direct Provision are **socially isolated** because:

- It is difficult if not sometimes impossible for outsiders (friends, organisations) to visit.
- Numerous centres are located outside of towns and villages.
- Education and work are inaccessible for many people living in Direct Provision.

(c) People living in Direct Provision are under **constant supervision and control** because:

- In many Direct Provision centres people are not at liberty to cook for themselves or eat anywhere other than the designated canteen, and meals are provided within strict timeframes.
- There is a severe lack of privacy. There is widespread CCTV in Direct Provision Centres, bedrooms are frequently shared, there are few if any spaces for private/family enjoyment, and although signing in procedures are forbidden by the revised house rules there are reports that managers of Direct Provision centres use post-boxes to monitor people's presence.
- People living in Direct Provision are routinely required to inform management of their plans if they wish to stay away from the Centre overnight.

The risk of dignity violations amounting to inhuman or degrading treatment, and the need for independent and robust supervision under OPCAT, are demonstrated in the following excerpts from an interview that ICCL carried out last summer with Lucky Khambule, organiser with MASI. Mr Khambule spent 3 years and 4 months living in Direct Provision centres from January 2013 onwards. He states:

One of his [the manager's] phrases was 'you don't get this in your country, go back to your country'. He had something especially with Africans, that manager.

...There was a situation where they supply toilet paper, soaps, tissue papers, shampoos at a specific time during the month. They would give you 2 bars of soap which must last you for the month. We lived on 19 euro, within a week you have finished that soap – the second week it's gone, and you want to go back to them to say you need soap. And they won't give you soap, they will never give you soap. They won't give you that.

When you ask for extra toilet paper you get a shouting at: 'No, you can't get it because it's past the time you're supposed to get it', and they tick for you. As you take, they tick, so you can't come back for the extra. When it's finished you go back, and that's where you're getting – you know, when you feel empty? You feel empty when a person talks to you in a demeaning way, in a way that puts you down. So people respond differently to those kind of things, you know? People ignore, some will argue, but arguing also doesn't take you anywhere. And it's an ongoing thing. When we're told 'You don't get this in your country'. I come from South Africa, we come from everywhere, and people are there for protection. And when you get told, 'Go back to your country, you won't get this in your country' – and we're talking a mere soap or shampoo. So, the main aim was to make sure we are scared, so we don't challenge things. It's their word, their word is final. And it's something they've been doing, even the staff were conditioned to treat people like that.

...It freezes you. You know when someone throws a word to you, that sinks, that lowers your self-esteem, it changes you. Because a person is a person of power, and uses words that are strong to you. Some people – I don't know if I'm explaining properly – but the words that are said to you personally, that are a personal way of saying things that attack your personality, and that makes a person feel empty. You know? It makes you feel empty, that this is the person that is supposed to give you the service that you need, but when you get there, you had to change your tune, had to be in a begging kind of mood for you to be on the right side of the staff in the office. You've got to show that you need them. OK? By conforming to the oppression that you get and trying to be nice - to smile even if you don't want to smile just because you need that service. People ended up doing that in order for them to be able to get some kind of a service or some kind of a smile back.

Where I was, there were 3 metres of trees planted around the centre. They will put wire, in some cases – in my case there was wire and long trees. You won't see anything. Others have walls. You won't see inside. It's for the people who are outside not to know what's going on there. When we closed that centre [in Kinsale Road, Cork] in 2014 – we closed the centre and started moving to the gate to be visible during our protest – people who were passing by stopped and said 'We have been passing every day going to work and didn't know there were people in this place here. We didn't know because it's trees.' It's a way of separating people from the people who are in Direct Provision. It's the way of separating.

But more than physical structures separating people, there is actually – it's very hard to get in. You can't – for instance, say you want to go and talk to somebody in Direct Provision as you. You will never get inside. You will never get inside. First you'll get the attitude – 'Who are you, why are you here?' You'll get that attitude. It's a non-welcoming attitude. It's always something. You'll say, 'Why are you hiding so much?' They don't want people to be speaking with people about what is happening there.

... You would say it's house detention. As I said earlier, the fact you know there's times they stipulate – they work on you. You are trapped. There are chains around you even if you don't have physical chains. There are mental chains put on you with the system. It promotes dependency. It promotes dependency. Once a person is dependent on something it's very hard for that person to be himself or herself again.

*ALJ and A, B and C's Application for Judicial Review (High Court of Northern Ireland)*

The judgment in the 2013 Northern Irish High Court case of *ALJ and A, B and C's Application for Judicial Review* [2013] NIQB 88 (in which the Court ruled that it would not be in the children's best interests to allow their extradition to the Republic of Ireland where they would be forced to live in Direct Provision) acknowledged the restrictions on the liberty of people living in Direct Provision at that time as follows:

[82] The respondent states that asylum seekers are not required to remain in the accommodation during the course of the day. That is correct insofar as they are not prohibited from moving out of the accommodation but in practical terms their lives are confined to that accommodation. It is a full board system. They need to remain to eat. The subsistence allowance is so small they cannot afford to feed themselves otherwise than by remaining in the accommodation at meal times. In addition by virtue of the size of the subsistence allowance they cannot afford to travel. They are not permitted to work.

The judgment further compared the situation of people living in Direct Provision at that time to the services and entitlements available in Northern Ireland:

[102]... ALJ, the children's primary carer, has no prospect of working in Ireland but has the prospect of working in Northern Ireland. The well-being both emotionally and financially of the primary carer and the importance of that to the well-being of the children in her care would point significantly to the best interests of the children being to remain in Northern Ireland. The children, most significantly A, has no prospect of working in Ireland but he has that prospect in Northern Ireland. In Northern Ireland the family is in a separate house of their own which they can call their home. In Ireland they are required to live in hostel accommodation and prevented from living in their own accommodation. In Northern Ireland the family are not bound to remain in close proximity to a hostel in order to eat regular meals. In Northern Ireland being in their own home they can interact with each other as a normal family without interference by other asylum seekers or by hostel staff. The children by virtue of being brought up in their own home can develop a sense of belonging and separate identity. In Ireland there are problems with enforced isolation and poverty. In Northern Ireland between the ages of 16 and 18 the children are entitled to receive a State education. That is not so in Ireland. A comparison of the description of the accommodation that is provided in Ireland and the accommodation that is provided in Northern Ireland shows a marked difference in quality and therefore in the quality of life of those who live in such accommodation. There is ample evidence of physical and mental health issues developing in Ireland amongst those asylum seekers who are in Direct Provision accommodation. Ireland has opted out of the minimum standards directive and there is considerable evidence that the provisions in Ireland do not meet the minimum standards in that directive. Any analysis of the best interests of the children would have led to the inevitable conclusion that the best interests of the children favoured remaining in Northern Ireland.

This judgment is a striking indictment of the conditions of Direct Provision Centres and should underline the urgent need for fundamental reform in the treatment of international protection applicants in Ireland.

## **8. Other accountability measures**

### ***National Archives***

We believe that there is an urgent need for the State to amend the National Archives Act and fund the expansion of the National Archives in order to ensure that the records created and held by the private operators of Direct Provision centres are available to individuals seeking their own personal information and to the public (which should be able to access administrative records 20 years after their creation, in accordance with ordinary practice under the National Archives Act).

The censorship and private possession of records continues to be one of the primary sources of suffering and ongoing rights abuse affecting people who experienced institutional abuse in Ireland throughout the 20<sup>th</sup> century. The State needs to ensure non-repetition of the past by way of creating new measures of accountability in how state-funded, social services are provided to people.

We recommend that the Committee consider the amendments proposed to the National Archives (Amendment) Act 2018 as it was passing through the Seanad in July 2018,<sup>33</sup> whereby it was sought to include within the remit of the Act the records of all ‘social service providers’, defined as follows:

‘social service provider’ means any institution, individual or entity specified in a Regulation made by the Taoiseach under this section, which is or was responsible or whose employees, agents or representatives are or were responsible for the provision of any social service partly or wholly funded by the State or which the State is or was under a statutory obligation to license, monitor or inspect.

### ***Investigations into deaths in Direct Provision***

We are deeply concerned by the deaths that are believed to have occurred by suicide in Direct Provision centres, and we recommend that the Committee considers whether the State has been complying with its obligation under the European Convention on Human Rights (ECHR) to investigate these deaths independently and impartially, thoroughly and in a sufficiently public manner as to ensure public confidence in the investigation process.

We believe that an examination needs to take place of whether the Coroner process as it stands under legislation and in practice is sufficient to address deaths in Direct Provision, and if not what reforms must be made.

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<sup>33</sup>See <https://data.oireachtas.ie/ie/oireachtas/bill/2017/110/seanad/4/amendment/numberedList/eng/nl-b11017d-srn.pdf>

The obligation under Article 2 ECHR to protect the right to life imposes an obligation on the State to investigate deaths whether they occur at the hands of State agents,<sup>34</sup> private persons,<sup>35</sup> or persons unknown.<sup>36</sup> In *Salman v Turkey*, recognising that “[p]ersons in custody are in a vulnerable position and the authorities are under a duty to protect them”,<sup>37</sup> the EctHR held that States are obliged to carry out an effective official investigation into deaths in custody or detention, even if no agent of the State was involved in the incident resulting in death. This was confirmed in *Musayeva v Russia*.<sup>38</sup> In *Fernandes v Portugal*, the EctHR held that the investigative obligation arises where a death occurs “in suspicious circumstances, even when the State has no direct responsibility for the death”.<sup>39</sup> In *Oneryildiz v Turkey* (a case in which numerous deaths were caused by an environmental disaster), the EctHR held that the investigative obligation arises “when lives have been lost as a result of events occurring under the responsibility of the public authorities, which are often the only entities to have sufficient relevant knowledge to identify and establish the complex phenomena that might have caused such incidents”.<sup>40</sup>

## **9. Recommendations**

**I. The system of accommodating and providing for the needs of individuals seeking international protection in Ireland should be overhauled to ensure that the rights of those individuals are respected, protected and fulfilled. In particular:**

- **Individuals seeking international protection should be provided with adequate care and support in appropriate settings to avoid re-traumatisation and to ensure their rights are respected.**
- **The constitutional right to work must be made practicable for international protection applicants by removing existing barriers such as the type of permits provided, lack of access to driving licenses and bank accounts, and major exclusions from the right as provided for by Government.**
- **All children must have access to education, whether or not they are in “emergency accommodation”.**
- **People in Direct Provision settings must be protected from cruel, inhuman or degrading treatment, including such as may result from long-term institutionalisation.**
- **Access to adequate healthcare for both physical and mental illness must be provided.**

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<sup>34</sup> *McCann v UK* A324 (1995); 21 EHRR 97 GC

<sup>35</sup> *Menson v UK* App No 47916/99; (2003) 37 EHRR CD 220

<sup>36</sup> *Togcu v Turkey* App No. 27601/95 (ECHR, 19 April 2002), *Kaya v Turkey* (1999) 28 EHRR 1; *Yasa v Turkey* 1998-VI; 28 EHRR 408.

<sup>37</sup> *Salman v Turkey* (2002) 34 EHRR 425, para 99

<sup>38</sup> (2008) 47 EHRR 25, para.77.

<sup>39</sup> *Fernandes v Portugal* App No 43098/09 (ECHR, 15 December 2015) para 70. See also *Tunç v Turkey* App no 24014/05, (ECHR, 25 June 2013), para 171; *McCaughy v United Kingdom* App No 43098/09 (ECHR, 15 December 2015)

<sup>40</sup> *Oneryildiz v Turkey* (2005) 41 EHRR 20 para 93



- **The right to respect for private and family life should be protected through the provision of proper family friendly accommodation including free access to cooking facilities and basic supplies.**
- **Continued reform of the international protection system is required to address excessive delays in the application process; and to ensure access to appropriate and necessary legal assistance, access to interpretation and translation, and monitoring of interviews.**
- **Individuals must have access to justice for rights violations experienced while living in Direct Provision.**

**II. The Committee should ensure that during their upcoming visits to Direct Provision Settings, they have broad and unannounced access to the centres and to individuals living within the system, in line with requirements of the Optional Protocol to the Convention against Torture and the recommendations of the Sub Committee on the Prevention of Torture.**

**III. The Committee should recommend that Ireland ratify OPCAT and create a National Preventive Mechanism with remit over social care settings, including Direct Provision Settings, with the Irish Human Rights and Equality Commission as the coordinating body.**

**IV. The Committee should include in their report a finding that Direct Provision Centres are places of deprivation of liberty and must be recognised as such.**

**V. The Committee should recommend the amendment of the National Archives Act and the expansion of the National Archives in order to require (on an ongoing basis) the production of the records currently held by Direct Provision operators which are 20 years old or more.**

**VI. The Committee should examine whether deaths in Direct Provision have been adequately investigated and whether the existing investigative mechanisms are sufficient to meet the State's obligation under Article 2 ECHR to investigate effectively all deaths that occur in Direct Provision.**